

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

ORIGINAL

74-2295

B
P/B

In The
United States Court of Appeals

For The Second Circuit

FANNY HANDEL,

Plaintiff-Appellee,

vs.

MEYER GOLD,

Defendant-Appellant,

and

PREL CORPORATION,

Defendant.

*On Appeal from an Order from the United States District Court
— Southern District of New York*

PETITION FOR REHEARING

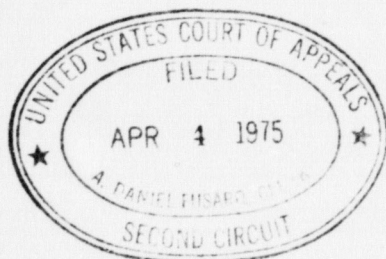
LAMPERT & LAMPERT

Attorneys for Defendant-Appellant

747 Third Avenue

New York, New York 10017

371-8811



(7817)

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing

South River, N. J.
(201) 257-6850

New York, N. Y.
(212) 565-6377

Philadelphia, Pa.
(215) 563-5587

Washington, D. C.
(202) 783-7288

in the
UNITED STATES COURT OF APPEALS
For The Second Circuit

Fanny Handel

Plaintiff-Appellee

vs

Meyer Gold

APPEAL
74-2295

Defendant-Appellant

and

Prel Corporation

Defendant

Petition For Rehearing

The appellant above named respectfully petition this Honorable Court for a rehearing of the appeal in the above entitled cause, and in support of this petition represent to the court as follows:

I reserve my argued position as to each of the points of the appeal, but in this petition address myself solely to that feature of the decision wherein I believe the court may be convinced its result is based upon the application of incorrect legal principles.

Therefore this petition is devoted to convincing this court that it erred in its decision by failing to resolve the fourth major question put to it in favor of the appellant.

The court in its oral opinion did not answer the question as to whether the District Court was required to hold an evidentiary hearing to determine the truth of the matters and issues of fact presented in the affidavits on the defendant's motion to vacate under Fed R. Civ. Pro. 60(B).

A large default judgment was entered against the defendant Meyer Gold in an action which is apparently without merit. This judgment was allowed to remain without the benefit of an evidentiary hearing despite the defendant's sworn statements that it was obtained by mistake and excusable neglect. The District Court was presented with affidavits which raised contested issues of fact as to the circumstances surrounding plaintiff's and defendant's knowledge and conduct with the alleged failure to comply with the discovery obligations. These numerous unanswered questions could only be resolved after a full hearing at which the defendant had the opportunity to produce witnesses and the plaintiff rebutting witnesses.

The Court in *Flaks vs Koegel* decided on September 25, 1974 504 F. 2d 702 (2nd Cir. 1974) stated:

"We are in no better or worse position than the District Court in the absence of evidence which a hearing could produce to determine whether or not Koegel's claims were credible. This position is not sufficiently secure to support the drastic action taken. We are persuaded that the proper resolution is to reverse the order

denying the Rule 60(B) motion and remand for an evidentiary hearing so that appropriate findings may be made consonant with the due process standards we have discussed."

The record is clear that an evidentiary hearing was not held in the District Court on the defendant's motion to vacate the default judgment and all doubts were resolved against the movant. This is contrary to our established legal principles and is not only a clear abuse of discretion but a violation of the appellant's constitutional rights. The court clearly erred in failing to apply the principles here urged.

For the foregoing reasons this petition for rehearing should be granted.

Lampert & Lampert
Attorneys for Appellants

by Irwin S. Lampert
member of the firm
747 Third Avenue
New York, N.Y. 10017
371-8811

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FANNY HANDEL,
Plaintiff-Appellee,
-against-
MEYER GOLD,
Defendant-Appellant,
~~AGGRIED~~
-and-
PREL CORPORATION,
Defendant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, Victor Ortega, being duly sworn,
deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York
That on the 7th day of April 1975 ~~XXXX~~ at see below

deponent served the annexed Petition for rehearing
see below

upon

the attorneys in this action by delivering ² a true copy ^{as} thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 7th
day of April 1975 ~~XXXX~~

Victor Ortega
Print name beneath signature

VICTOR ORTEGA

KAUFMAN TAYLOR KIMMEL & MILLER
41 E. 42nd Street
New York, N. Y.

BORDEN & BALL
345 Park Ave
New York, N. Y.

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0416050
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1976
1977